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No. 03-

IN THE

Supreme Court of the United States

SAN DIEGO ASSOCIATION OF REALTORS, ET AL.,
Petitioners,

v.

ARLEEN FREEMAN AND JAMES ALEXANDER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, as the Ninth Circuit held, an agreement between joint venturers to set a price for services that are concededly necessary to support their new, procompetitive product may nevertheless be condemned, under Section 1 of the Sherman Act, as unlawful per se?

PARTIES AND RULE 29.6 STATEMENT

The parties to this petition are the San Diego Association of Realtors®, North San Diego County Association of Realtors®, Pacific Southwest Association of Realtors®, East San Diego County Association of Realtors®, Coronado Association of Realtors® (collectively, the "associations"), and SANDICOR, Inc. ("Sandicor").

Pursuant to Rule 29.6 of the Rules of this Court, the Associations state that they are non-profit mutual benefit corporations; none has a parent or any publicly held corporation that owns 10% or more of its stock. Sandicor is a California domestic stock corporation, wholly owned by the associations.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	9
CONCLUSION	23

TABLE OF AUTHORITIES

CASES Page

Addamax Corp. v. *Open Software Found., Inc.*, 152 F.3d 48 (1st Cir. 1998) 11, 12
Albrecht v. *Herald Co.*, 390 U.S. 145 (1968) 21
Arizona v. *Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) 8, 20, 21
Augusta News Co. v. *Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001) 11
Broadcast Music, Inc. v. *CBS, Inc.*, 441 U.S. 1 (1979) 8
Business Elecs. Corp. v. *Sharp Elecs. Corp.*, 485 U.S. 717 (1988) 21
California Dental Ass'n v. *FTC*, 526 U.S. 756 (1999) 17, 18, 21
Chicago Prof'l Sports Limited P'ship v. *National Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996) 13, 14
City of Mount Pleasant, Iowa v. *Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988) 13
Fraser v. *Major League Soccer*, 284 F.3d 47 (1st Cir.), *cert. denied*, 123 S. Ct. 118 (2002) 13
Freeman v. *San Diego Ass'n of Realtors*, 77 Cal. App. 4th 171, 91 Cal. Rptr. 2d 534 (1999) 6
Los Angeles Mem'l Coliseum Comm'n v. *National Football League*, 726 F.2d 1381 (9th Cir. 1984) 15
Massachusetts Food Ass'n v. *Massachusetts Alcoholic Beverages Control Comm'n*, 197 F.3d 560 (1st Cir. 1999) 19
National Bancard Corp. (NaBanco) v. *Visa USA, Inc.*, 779 F.2d 592 (11th Cir. 1986) 14
National Collegiate Athletic Ass'n v. *Board of Regents*, 468 U.S. 85 (1984) 21

TABLE OF AUTHORITIES – continued

Page

Northwest Wholesale Stationers, Inc. v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) 21

Palmer v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) 18

Polk Bros., Inc. v. *Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985) 12, 13

Rothery Storage & Van Co. v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986) 14, 19

SCFC ILC, Inc. v. *Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) 14

State Oil Co. v. *Khan*, 522 U.S. 3 (1997) 21

United States v. *Sealy, Inc.*, 388 U.S. 350 (1967) .. 8

United States v. *Topco Assocs., Inc.*, 405 U.S. 596 (1972) 7, 8, 18, 19

STATUTE

15 U.S.C. § 1 1

ADMINISTRATIVE DECISION

Polygram Holding, Inc., No. 9298 (F.T.C. July 24, 2003), *available at* http://www.ftc.gov/os/2003/07/polygramopinion.pdf 10, 17

SCHOLARLY AUTHORITIES

13 H. Hovenkamp, *Antitrust Law* (1999) 19

M.B. Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do* Sealy *and* Topco *Logically Survive* Sylvania *and* Broadcast Music*?*, 66 Va. L. Rev. 879 (1980) ... 22

T. Muris, *The Federal Trade Commission and the Rule of Reason: In Defense of* Massachusetts Board, 66 Antitrust L.J. 773 (1998) 19

TABLE OF AUTHORITIES – continued

Page

T. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137 (2001)..... 15, 16

G. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701 (1998)..... 19

OTHER AUTHORITIES

Antitrust Div., Dep't of Justice, 3G Patent Platform Partnership Business Review Letter (Nov. 12, 2002), *available at* http://www.usdoj.gov/atr/public/busreview/200455.pdf..... 17

Antitrust Div., Dep't of Justice, Toshiba-Time Warner DVD Business Review Letter (June 10, 1999), *available at* http://www.usdoj.gov/atr/public/busreview/2485.pdf..... 17

Fed. Trade Comm'n & Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000)..... 10, 15, 16

PETITION FOR A WRIT OF CERTIORARI

Petitioners San Diego Association of Realtors® *et al.* respectfully submit this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 322 F.3d 1133, and is reprinted as reported in the appendix (Pet. App.) at 1a-35a. The order of the court of appeals amending the initial opinion, and denying rehearing and rehearing en banc, is unpublished (and not currently reflected in the published versions), and is reproduced at Pet. App. 121a-122a. The opinion of the district court is unpublished, and is reproduced at Pet. App. 36a-78a. The opinion of the California Court of Appeal affirming dismissal of the prior state court lawsuit is published at 91 Cal. Rptr. 2d 534, 77 Cal. App. 4th 171, and is reprinted at Pet. App. 79a-120a.

JURISDICTION

The opinion and judgment of the Court of Appeals was filed on March 10, 2003. The order amending the opinion, and denying rehearing and rehearing en banc, was filed on April 24, 2003. On July 9, 2003, Justice O'Connor extended the time for filing the petition to and including August 22, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISION

Section 1 of the Sherman Act, 15 U.S.C. § 1, states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign

> nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This petition raises a recurring issue of central importance to Section 1 of the Sherman Act and to competition policy: the circumstances under which the per se rule may be applied to legitimate joint ventures.

The case arises out of the decision of eleven local associations of Realtors® in San Diego County (the "associations") to merge their individual and unique real property multiple listing services ("MLS") to create, for the first time, a county-wide multiple listing service. Previously, each association's MLS included property listings from what was essentially a geographically distinct, non-overlapping area of the County. As the Ninth Circuit observed, "[n]one of the essential facts is disputed." Pet. App. 10a, 3a n.1. All agree that creating this new MLS was a procompetitive joint venture that reduced operating costs, facilitated competition among individual real estate agents, and made it more efficient for consumers to buy and sell homes. *Id.* at 4a, 34a, 64a-65a. The principal dispute is whether an agreement by the joint venturers on the price of services "necessary" to the operation of the new MLS and which the associations were uniquely suited to provide was unlawful under Section 1 of the Sherman Act.

1. Multiple Listing Services Before 1991. For decades, real estate agents have cooperated to combine the listings of homes-for-sale that each individual agent had obtained. Such

consolidated or "multiple" listing services help both buyers and sellers of homes, each of whom has an interest in gaining ready access to the widest number of potential homes-for-sale or home-purchasers as practicable. Such services also increase the competition between real estate agents for facilitating the purchase and sale of homes by lowering each agent's transaction costs, and ensuring that a purchaser or seller need not work only through one particular agent to gain access to a particular home or buyer. Pet. App. 3a-4a, 64a.

The first multiple listing services were created by cooperating real estate agents who compiled their listings into a book that was distributed to all participating agents. Beginning in the late 1970s, the listings were also compiled in electronic form and made available by access through dedicated computer terminals and, more recently, through personal computers as well.

Originally, multiple listing services were provided to real estate agents in San Diego County principally by the eleven local associations. Pet. App. 39a. Each local association operated an MLS that served a separate area of San Diego County, with the MLSs of all eleven associations collectively covering the entire county. *Id.*[1] Each association set prices and provided support services for its own MLS. *Id.* at 3a.

Each local association also developed and maintained its own geographically unique set of property listings. With few exceptions, there was no overlap between the listings available from one association's MLS and another's. A real estate agent who joined an association-owned MLS that served the geographic area in which that agent's business was

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[1] A twelfth group, not affiliated with the National Association of Realtors®, maintained an independent database. Its listings featured properties in one community (La Jolla) and overlapped the listings in the local association's database that also served that area. This twelfth group did not participate in forming Sandicor and was not considered relevant to the issues below. Pet. App. 3a-4a & n.3, 39a-40a.

located submitted all qualified listings from that area to the local association's MLS. To have access to listings outside the geographic area served by that association's MLS, an agent had to subscribe and pay fees to more than one MLS. Pet. App. 3a, 39a-40a.

In the 1980s, some of the local associations began to consolidate their MLSs. By 1991, San Diego was served by four MLS databases, each with its own rules and system requirements, and each independently supported by the eleven local associations. To obtain access to all listings in San Diego County in 1991, an agent still "had to subscribe to more than one MLS." Pet. App. 3a.

2. Formation of Sandicor, Inc. By 1991, with their computer equipment needing replacement and the potential benefits of further consolidation now clear, the associations discussed whether to form a county-wide MLS. They chose to do so by creating a new privately held corporation, "Sandicor, Inc." Sandicor is wholly owned by the local associations, which appoint its board of directors. Pet. App. 4a-5a.

The associations assigned some essential aspects of the operation of the new county-wide MLS to Sandicor, but determined that other necessary functions could be performed equally well or better by the associations. They decided that Sandicor would be responsible for purchasing servers and maintaining the electronic database of listings, for establishing rules and regulations, and for providing the associations with standardized forms, supplies, and training in how to use the new county-wide database. The associations, in contrast, would be responsible for other "necessary" tasks, including "enroll[ing] new MLS subscribers, bill[ing] and collect[ing] payments, ensur[ing] that postings comply with guidelines, and provid[ing] support staff to answer subscribers' questions." Pet. App. 3a. It is undisputed, and the Ninth Circuit acknowledged, that providing such support services is "part of the *necessary* overhead of delivering an

MLS." *Id.* (emphasis added). Indeed, it is obvious that if an MLS cannot enroll, bill, collect from, or assist subscribers, it cannot function at all.

Finally, the associations agreed upon uniform payments that each would receive from Sandicor for providing Sandicor with these necessary support services. See Pet. App. 123a-129a (sample service agreement). They initially set the principal monthly payment from Sandicor to the local associations at $25.00 per subscriber. This level was higher than the (allegedly $10) per-subscriber cost that the largest local association (San Diego) had formerly incurred for providing support services to its (south county) MLS, but lower than the costs (allegedly $50) that two of the smallest associations (Fallbrook and Valley Center) had formerly incurred for supporting their (north county) MLS. *Id.* at 4a-5a. It was further agreed that MLS subscribers would pay a stated monthly fee to Sandicor, and that none of the associations would discount this fee or credit any portion of it against other services. *Id.* at 5a.

It is undisputed that compensating the local associations at a uniform per-subscriber rate higher than a $10 rate, as well as providing an additional subsidy to the two smallest associations, was essential to reaching agreement on creating a county-wide MLS. The smaller associations needed the additional revenue to cover their costs of providing support services, and to induce them to contribute their unique sets of listings (which were their principal revenue-generating assets) to the new county-wide MLS. "Without the revenue guaranteed by the fixed support fee, 'the smaller Associations would not have joined,' and Sandicor would not have had a 'truly regional MLS.'" Pet. App. 6a.

3. The State Court Litigation. Respondent Arleen Freeman (a local real estate agent) initially sued Sandicor, the associations that own Sandicor, and certain individual directors of the associations and of Sandicor in California state court. Pet. App. 79a-80a & n.1. Her complaint, filed in

1997, alleged, *inter alia*, that the defendants violated California's antitrust laws by engaging in price-fixing and by tying the sale of MLS listings to MLS support services. The trial court dismissed her complaint and the court of appeal affirmed. *Freeman* v. *San Diego Ass'n of Realtors*, 77 Cal. App. 4th 171, 91 Cal. Rptr. 2d 534 (1999), Pet. App. 79a-120a.

Relying on federal law authorities, the California Court of Appeal held that the complaint, on its face, did not state a claim for price-fixing. The court observed that the allegedly fixed price was merely the price of "a new product – the county-wide MLS" created by a joint venture. Plaintiff "did not allege" that separate entities conspired to fix a price for a good or service that they would otherwise "separately" compete to provide. The price-fixing claim was thus legally deficient. Pet. App. 101a-102a. The court also dismissed Freeman's tying claim because there obviously is no market for the allegedly "tied" product (the support services for an MLS) that is separate from the market for the tying product (the database of listings). *Id.* at 90a, 91a-94a.

4. The District Court's Ruling. After the state trial court dismissed her antitrust suit, Ms. Freeman, joined by two other real estate agents, re-filed her suit in federal court, this time pleading claims under the Sherman Act. After dismissing all but one of the individual defendants and allowing extensive discovery, the district court granted defendants' motion for summary judgment on the merits of plaintiffs' Sherman Act claims. Pet. App. 44a-45a, 75a-76a.

The district court held that plaintiffs' price-fixing claims mischaracterized the nature of the joint venture. The service center functions "are in fact part of the MLS services Sandicor offers." Pet. App. 58a. The allegedly unlawful agreements simply "require the Associations to deliver these [support] services – as part of *Sandicor*'s MLS services – *to Sandicor*'s MLS participants." *Id.* at 60a. There was thus no evidence to support "Plaintiffs' claim that the Associations

sell service center functions to Sandicor who passes on an inflated price to consumers." *Id.* Rather, "Sandicor's founders favored the operation of service centers by the local Associations 'due to the great efficiencies that result from the sharing of facilities and personnel between MLS and Association activities.'" *Id.* at 42a; see *id.* at 58a-60a, 68a.

The district court also rejected plaintiffs' principal argument, under this Court's decision in *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596 (1972) ("*Topco*"), that the price agreements were unlawful per se. The district court distinguished *Topco* as a case that did not involve a restraint "ancillary to the creation of a new product or service that could not have been created without joint conduct." Pet. App. 64a. Here, by contrast, Sandicor "was created to provide a pro-competitive product." *Id.* "The benefit of Sandicor's countywide MLS," according to the district court, "is that real estate agents now only need to purchase MLS services from one Association to obtain countywide property information." *Id.* at 41a. This product, moreover, "could only be achieved by each of the Associations contributing their separate MLSs – each covering only a portion of San Diego County – to create a countywide MLS." *Id.* at 64a. Where the alleged restraint solely affects competition related to supporting a wholly new product created by the venture itself, the participants in that venture are permitted to "set a price." *Id.*

5. The Ninth Circuit's Decision. The Ninth Circuit reversed the district court's decision to grant summary judgment for the local associations and Sandicor as to price-fixing, and stated that the district court "should have . . . awarded it to plaintiffs instead." Pet. App. 35a.[2] The court of appeals held that the agreement between the associations and

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[2] The Ninth Circuit affirmed summary judgment in favor of defendants on plaintiffs' Section 2 claim, and also affirmed summary judgment on all claims as to defendant California Association of Realtors®. These holdings are not at issue here.

Sandicor on a uniform per-subscriber payment for the provision of support services was a price-fixing agreement among horizontal competitors that is unlawful per se.

The court of appeals took as its point of departure this Court's statement in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 345 (1982) ("*Maricopa*") that "'"no showing of so-called competitive abuses or evils which those [price-fixing] agreements were designed to eliminate or alleviate may be interposed as a defense."'" See Pet. App. 10a (also quoting *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940)). The Ninth Circuit rejected the district court's and California Court of Appeal's holdings that the associations and Sandicor were effectively a single entity entitled to set a price for its new product, which none of them separately did provide or could have provided. Pet. App. 10a-16a. Citing, *inter alia*, *United States* v. *Topco Assocs.*, 405 U.S. 596 (1972), and *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967) ("*Sealy*"), the Ninth Circuit held that the challenged agreement restrained price competition between "at least potential" if not "*actual* competitors" (see Pet. App. at 18a-20a), and was unlawful per se. *Id.* at 18a-22a, 22a-28a.

The court of appeals also rejected petitioners' argument that under *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1 (1979) ("*BMI*"), the agreement on the price of support services was lawful, or at least subject to evaluation under the rule of reason. The court viewed *BMI* as limited to agreements that are a "'necessary consequence'" of a joint venture (Pet. App. 22a (quoting *BMI*, 441 U.S. at 21)), and offered several reasons why, in the court's view, an agreement as to a single price for support services was not "necessary as a matter of law." *Id.* at 23a-27a. The court speculated, for example, that the associations could have chosen to price the support services they offered individually, thereby permitting the "most efficient" association (the San Diego Association of Realtors®) to offer a lower price than the allegedly "supracompetitive" price to which the joint venturers agreed.

Id. at 10a-12a, 26a-27a. The court also suggested that the other venturers could have either "increased the subsidies to the[] two [smallest] associations," or "formed [the new MLS] without them and then competed for their 400 subscribers." *Id.* at 27a.

In short, the court of appeals viewed the case as a classic example of unlawful price-fixing: "Rarely do antitrust defendants serve up their own heads on so shiny a silver platter." Pet. App. 21a. If creating a county-wide MLS could come about only through the sacrifice of smaller associations, so be it: "The Sherman Act, to put it bluntly, contemplates some roadkill on the turnpike to Efficiencyville." *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's vividly worded opinion is intended to influence future decisions involving pricing agreements related to joint ventures. Yet its provocative application of the per se rule to an integrated, efficiency-enhancing joint venture is profoundly wrong.

The Ninth Circuit accepts as true that the county-wide MLS was a new and procompetitive service that could have been created only by integrating the unique assets of each association. Pet. App. 4a; see *id.* at 64a. The Ninth Circuit also acknowledges that the challenged price agreement was for "part of the necessary overhead of delivering" that new MLS. *Id.* at 3a. The agreement at issue thus restrained, at most, only an aspect of competition that the joint venture itself made possible. In these circumstances, where joint venturers set a price for services necessary to support their new procompetitive product, the per se rule should not apply as a matter of law.

In comparable circumstances, both the First and Seventh Circuits have squarely rejected the application of the per se rule. This conflict alone warrants plenary review, because clarity and uniformity in this area of antitrust law are

particularly important. As the Federal Trade Commission ("FTC") recently observed, there is no issue "more important to U.S. competition policy than defining the bounds of acceptable cooperation between direct rivals."[3]

The Ninth Circuit's analysis and result are also contrary to the *Antitrust Guidelines For Collaborations Among Competitors* ("*Collaboration Guidelines*"), jointly issued by the FTC and the United States Department of Justice (DOJ) (collectively, the "Agencies"), to help define the boundaries of acceptable collaboration, to dispel confusion about how the Agencies now apply Section 1 to joint ventures, and to avoid deterring procompetitive joint ventures. Applying the *Collaboration Guidelines*, it is evident that neither Agency would have objected to the challenged agreement as unlawful per se. This inconsistency further justifies review by this Court.

Finally, the Ninth Circuit's decision highlights the significance of tension in this Court's leading joint venture decisions and confirms the need for clearer guidance from this Court. The Ninth Circuit narrowly construed *BMI*, and instead relied on *Maricopa* and *Topco*, which each condemned per se a horizontal agreement among joint venturers that the competitors sought to defend as procompetitive under the rule of reason. Other circuits, and the Agencies, view *BMI* as establishing the basic analytical framework for legitimate, efficiency-enhancing joint ventures. They treat *Maricopa* as a case not involving a truly "integrated" joint venture, and *Topco*'s "rigid" directive to apply the per se test in all horizontal pricing cases as "effectively overruled." The latter view is consistent with this Court's post-*Maricopa* cases, which discourage lower courts

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[3] *Polygram Holding, Inc.*, No. 9298, slip op. at 2 (F.T.C. July 24, 2003) (opinion), *available at* http://www.ftc.gov/os/2003/07/polygramopinion.pdf.

from applying the per se rule to potentially procompetitive conduct.

In short, this Court's joint venture precedents are unclear and, as a result, the Ninth Circuit has read *BMI* too narrowly and *Topco* and *Maricopa* too broadly. This is precisely the opposite of the reading that other circuits and the Agencies have given these cases and reinforces the perception, dangerous to competition, that the Sherman Act is hostile even to procompetitive joint ventures. The Court should resolve this tension and the conflicts below, reject use of the per se rule to condemn pricing agreements for services necessary to support the procompetitive products of legitimate joint ventures, and affirm the lawfulness of the agreement challenged here.

1. The First Circuit has repeatedly held that a price agreement that is "part of a larger, legitimate economic venture" is not unlawful per se. *Augusta News Co.* v. *Hudson News Co.*, 269 F.3d 41, 47 (1st Cir. 2001); *Addamax Corp.* v. *Open Software Found., Inc.*, 152 F.3d 48, 51-52 (1st Cir. 1998).

In *Augusta News*, the plaintiff formerly distributed periodicals to certain outlets of large chain stores. Other competing distributors formed a joint venture, and agreed to provide chain stores with up-front per-store fees in return for exclusive distribution contracts. The First Circuit rejected plaintiff's claim that these fee agreements between horizontal competitors were unlawful per se. It observed that the joint venture was procompetitive, in that it offered "one stop service for large buyers" which none of the smaller competing distributors "could as easily provide by itself." 269 F.3d at 48. The "up-front payments" were not strictly necessary to the venture and might have been "attacked under the rule of reason." *Id.* But because they were part of a "bona fide joint venture," they could *not, as a matter of law*, be attacked as unlawful per se. *Id.* at 49.

In *Addamax*, a joint research and development foundation established by large computer manufacturers allegedly engaged in unlawful price-fixing by forcing down the price of key software inputs below market levels. The First Circuit held that "[w]here the venture is producing a new product . . . conduct that is strictly ancillary to this productive effort (*e.g.*, *the joint venture's decision as to the price at which it will purchase inputs*) is evaluated under the rule of reason." 152 F.3d at 52 (emphasis added).

Like the defendants in *Addamax*, the petitioners agreed to a price at which they would "purchase inputs" – *i.e.*, support services necessary for the new MLS. And as in *Augusta News*, the petitioners established a "bona fide" joint venture that created a new product (a county-wide MLS) that no individual association "could as easily provide by itself." There is no question that the First Circuit, applying *Addamax* and *Augusta News*, would have roundly rejected respondents' per se claim as a matter of law.

The Seventh Circuit also would have rejected respondents' per se attack. In its seminal opinion in *Polk Bros., Inc.* v. *Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985), the court reversed a finding that an agreement between two retailers not to compete in certain product lines was unlawful per se. The Seventh Circuit observed that "[j]oint ventures, mergers, systems of distribution – all these and more require extensive cooperation, and all are assessed under a Rule of Reason . . . . Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment." *Id.* at 188. Significantly, the same self-preservation concern of joint venture partners that was dismissed by the Ninth Circuit (Pet. App. 24a) provided an important basis for the Seventh Circuit's application of the rule of reason. The Seventh Circuit recognized that certain cooperation will occur only if one "[k]now[s] that he is not cutting his own throat by doing so," and so where the restraint affected only new competition

that itself was made possible by the joint venture, the "Rule of Reason" should apply. *Polk Bros.*, 776 F.2d at 189-90.

More broadly still, in *Chicago Professional Sports Limited Partnership* v. *National Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996), the Seventh Circuit reversed findings that a league of individually owned sport teams could not be treated as a single entity and had unlawfully fixed broadcast-fees that teams paid to the league. The Seventh Circuit held that legitimate collaborative activity is either lawful (if undertaken by what should be deemed a "single entit[y]" in a given situation), or else "assessed under the Rule of Reason."[4] *Id.* at 598; see *id.* at 599 (same).

Had the Seventh Circuit evaluated the challenged agreement here under the single entity/joint venture "typology" set forth in *Chicago Professional Sports*, it would have affirmed the district court. It might have agreed with the district court (and the state court of appeal) that in setting a price for support services necessary to running the new county-wide MLS, the petitioners did not "'deprive[] the marketplace of the independent centers of decisionmaking that competition assumes,'" but simply set a price for an input integral to a new product.[5] Because the support services were

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[4] In this respect, the Seventh Circuit's treatment of "interdependent multi-party enterprises" was echoed by the First Circuit in *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 58-59 (1st Cir.), *cert. denied*, 123 S.Ct. 118 (2002), where Chief Judge Boudin recognized that sports leagues, like "franchising arrangements and joint ventures that perform specific services for competitors," should be evaluated either under the developing single entity doctrine, or under a "more flexible" rule of reason analysis, but that unquestionably "[t]he rejection of the *per se* rule [in these circumstances] is straightforward." *Id.*

[5] *Chicago Sports*, 95 F.3d at 598 (quoting *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 769 (1984)); *see also* Pet. App. 63a-64a (relying on same aspect of *Copperweld*); *City of Mount Pleasant, Iowa* v. *Associated Elec. Coop., Inc.*, 838 F.2d 268, 274-77 (8th Cir. 1988).

part of the "necessary" overhead of any MLS, the Seventh Circuit thus might have rejected the Ninth Circuit's attempt to ensure that the venture set a "fair" price for support services as "read[ing] like the ruling of an agency exercising a power to regulate rates." 95 F.3d at 597. Cf. Pet. App. 117a n.35 (California Court of Appeal declining plaintiff's request that it assume "the role of a price control board").

Alternatively, the Seventh Circuit would have applied and upheld the agreement under the rule of reason. The Seventh Circuit would have understood that the creation of a county-wide MLS, though "reduc[ing] the number of independent decisionmakers" who controlled the terms of MLS services in San Diego County, nevertheless "may improve efficiency" by providing real estate agents with a superior product. 95 F.3d at 598. With its standardized property profile forms that help "preserve the integrity of the listing service" (see Pet. App. 59a) and "one stop service" for listings in a consolidated database, among other improved features, the joint venture's new county-wide MLS facilitated information exchange, increased output, and offered new efficiencies impossible before the integration. Because the allegedly unlawful agreement affected only the price of a new and concededly procompetitive product that none of the venturers individually did produce or could have produced, the Seventh Circuit would likely have upheld the agreement as lawful.

The conduct found per se unlawful in the Ninth Circuit is thus typical of activity that other circuits regard as potentially beneficial to consumers and competition and therefore refuse to condemn as unlawful per se.[6] In the First and Seventh

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[6] Other circuits may well have reached a similar conclusion. *See, e.g., SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994); *National Bancard Corp. (NaBanco)* v. *Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986); *cf. Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986). Rather than rely on these cases, the panel below placed great weight on Ninth Circuit precedent that is hostile to procompetitive collaborations. *See* Pet. App. 18a (citing *Los Angeles*

Circuits, the pricing agreement challenged here would have been upheld either as within the discretion antitrust law accords a joint venture to set a price for inputs necessary to support a new product, or, at the very least, as on balance procompetitive under the rule of reason. The need to ensure uniform national application of the Sherman Act in an area of central importance to the national economy justifies this Court's plenary review.

2. Neither the DOJ nor the FTC would have objected to the challenged agreement as unlawful per se. In the preamble to their jointly issued *Collaboration Guidelines*, the Agencies recognize that "[c]ompetitive forces are driving firms toward complex collaborations" and that such collaborations "often are not only benign but procompetitive." Accordingly, "in the last two decades," the Agencies "have brought relatively few civil cases against competitor collaborations." Furthermore, the Agencies express concern that "a perception that antitrust laws are skeptical about [competitor] agreements among actual or potential competitors may deter the development of procompetitive collaborations."[7]

Mem'l Coliseum Comm'n. v. *National Football League*, 726 F.2d 1381 (9th Cir. 1984)); *see* 726 F.2d at 1406 (Williams, J., dissenting in part) (criticizing majority's rejection of the single entity defense, especially where the "distinct units" of an enterprise "are inextricably bound in an economic sense" and "cannot produce separate, individual goods or services absent coordination").

[7] Fed. Trade Comm'n & Dept. of Justice, *Antitrust Guidelines For Collaborations Among Competitors* 1 (Apr. 2000). *See* T. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1171-72 & nn.196-203 (2001) (showing that commentators believe "'antitrust joint venture law has been a morass of confusion and ambiguity,'" in which joint ventures "'receive[] a more hostile reception in the agencies and courts' than mergers" which eliminate competition entirely); *see id.* at 1172 (reporting observation by then-FTC Chairman Robert Pitofsky that "'uncertainties in enforcement policy (and law) have almost certainly blocked, delayed, or raised the cost of legitimate [joint ventures].'") (alteration in original). Notably, companies that do not abandon collaboration altogether will opt to merge,

The *Collaboration Guidelines* are intended to counter that perception. They make clear that where "participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, *even if it is of a type* that might otherwise be considered per se illegal." *Guidelines* § 3.2, at 8 (emphasis added).

The joint venture here satisfies the definition in the *Guidelines* of an "efficiency-enhancing integration": "Participants in an efficiency-enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately." *Id.* The Agencies also recognize, contrary to the Ninth Circuit, that "[a]n agreement may be 'reasonably necessary' [to achieve the procompetitive benefits of the venture] without being essential," and consequently will "not search for a theoretically less restrictive alternative that was not practical given the business realities." *Id.* § 3.2, at 9.

The *Guidelines* nowhere rely upon this Court's decisions in *Topco* or *Sealy*, two heavily criticized joint-venture decisions that helped create anti-joint venture perceptions, and that the Ninth Circuit found to establish "principles" that controlled the decision here. Pet. App. 18a-19a. Equally important, the *Guidelines* treat the Court's decision in *Maricopa* as turning significantly on the finding that the challenged venture involved "no integration" of assets. *Guidelines* § 3.2, at 8-9 nn.18, 20. The Ninth Circuit, in contrast, viewed *Maricopa*

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even though less restrictive cooperative arrangements would enhance efficiency. *Id.* Here, for example, a full merger of the associations to create a county-wide MLS would not have been condemned as unlawful per se, and yet such a complete merger would have denied agents the benefit of competition between the associations for new members.

as controlling without regard to petitioners' undisputed integration of complementary assets.

Under the *Guidelines* then, the Agencies would have concluded that the support services agreement is not unlawful per se.[8] That is because petitioners integrated their unique listing assets into a new efficiency-enhancing product that no individual participant could have achieved separately, and because the challenged agreement relates to the pricing of a "necessary" part of that procompetitive product. Applying the *Guidelines*, the Agencies would have evaluated the agreement's merits under the rule of reason and acknowledged the venture's right to set a price for these required inputs for its new, procompetitive product. They would not have invoked *Topco*, *Sealy*, or *Maricopa* to condemn the agreement as unlawful per se.

Indeed, in its recent *Polygram* decision, the FTC understood its *Guidelines* and this Court's decision in *California Dental Ass'n* v. *FTC*, 526 U.S. 756 (1999), to require the agency to consider "at some length" the "proffered justifications" for an agreement of competitors to "restrict competition by products wholly *outside* a joint venture." *Polygram Holding, Inc.*, No. 9298, slip op. at 41, 49 (F.T.C. July 24, 2003), *available at* http://www.ftc.gov/os/2003/07/polygramopinion.pdf. Lengthy consideration is warranted all the more here, where the agreement pertains to the price of inputs that are concededly necessary to the provision of the

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[8] *See, e.g.*, Antitrust Div., Dept. of Justice, 3G Patent Platform Partnership Business Review Letter 11 (Nov. 12, 2002) (joint patent evaluation and licensing process, including standardized royalty formulae, deemed acceptable under rule of reason, where restraints were justified by "their relationship to an integration of complementary resources"), *available at* http://www.usdoj.gov/atr/public/busreview/200455.pdf; Antitrust Div., Dept. of Justice, Toshiba-Time Warner DVD Business Review Letter 13 (June 10, 1999) ("royalty-allocation formula" not unlawful per se), *available at* http://www.usdoj.gov/atr/public/busreview/2485.pdf.

same new product that the joint venture itself was uniquely able to create.[9]

The Ninth Circuit's opinion reinforces the "perception" that the antitrust laws remain hostile to genuine, efficiency-enhancing competitor collaborations. That is the very perception that the federal antitrust Agencies now seek, through their *Guidelines*, to dispel. Only this Court can provide the definitive guidance that is needed.

3. The conflicts discussed above reflect longstanding tension in this Court's joint venture cases. Two of this Court's leading joint venture cases – *Topco* and *Maricopa* – are inconsistent with the third leading case – *BMI* – and with the trend away from per se analysis in many of the Court's subsequent non-joint-venture decisions.

In *Topco*, the Court applied the per se rule to invalidate an agreement among small grocery store chains to allocate the territories in which they would market the private-label goods to which their joint venture gave them access. The Court has since relied upon *Topco* to confirm that naked agreements among horizontal competitors to allocate territories are per se unlawful. *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (per curiam).

But the Court appeared to go further in *Topco*. It applied the per se rule notwithstanding Topco's argument that its joint venture "could not exist if the territorial divisions were anything but exclusive," and that the joint venture "increases competition by enabling its members to compete successfully with larger regional and national chains." 405 U.S. at 605. The Court's opinion can be read to reject such a

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[9] By contrast, the decision below fails to distinguish, or even acknowledge, this Court's decision in *California Dental Assoc.* v. *FTC*, 526 U.S. 756 (1999), which overturned the Ninth Circuit's "quick look" determination under Section 1 and held that the competitive effects of an advertising restraint imposed by a professional association must be analyzed more thoroughly under the rule of reason. *Id.* at 759.

justification – even assuming its assertions could be proven true – on the ground that it is for Congress, not the courts, to modify the application of the "rigid" per se rule, even when it operates to stifle rather than promote competition. *Id.* at 608-12.

This broader aspect of *Topco* is not discussed in the *Guidelines* or in some court of appeals decisions that insist upon rule of reason treatment for agreements that are part of legitimate joint ventures. But other courts have expressly concluded that this broader aspect of *Topco* has been "effectively overruled." See, *e.g.*, *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 226 (D.C. Cir. 1986) ("to the extent that *Topco* and *Sealy* stand for the proposition that all horizontal restraints are illegal per se, they must be regarded as effectively overruled"); *Massachusetts Food Ass'n* v. *Massachusetts Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 564 n.2 (1st Cir. 1999) ("*Topco* may no longer be good law for its broader proposition that such a restraint is condemned *per se* even where it is ancillary to a productive joint venture"). Leading commentators also have convincingly demonstrated that *Topco*'s per se condemnation of an agreement that partly restrained *only* the very competition that the joint venture itself created is illogical, and that *Topco*, at least on this point, was wrongly decided.[10] Yet this Court has never disavowed or distinguished this

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[10] *See, e.g.*, G. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 710-11 (1998) (criticizing *Topco* because "[p]er se treatment is not appropriate for a restraint on competition created by a joint venture"); 13 H. Hovenkamp, *Antitrust Law* ¶ 2134c2, at 164 (1999) (under *Topco*'s reasoning, "even the most unambiguously procompetitive joint venture would have to be considered illegal, for ventures typically impose restrictions on the participants' venture output"); *cf.* T. Muris, *The Federal Trade Commission and the Rule of Reason: In Defense of* Massachusetts Board, 66 Antitrust L.J. 773, 796 (1998) ("*Topco*'s rejection of economic analysis is antithetical to the modern antitrust jurisprudence that began shortly after *Topco*.").

aspect of *Topco*, which the Ninth Circuit effectively enforced in the decision below.

BMI and *Maricopa* exacerbate the uncertainty. At issue in *BMI* was a blanket license to thousands of copyrighted songs created through a joint venture of copyright owners. The United States advised (as *amicus*), and the Court unanimously concurred, that the blanket license was a procompetitive new product, and that the literal price-fixing necessary to create it should not be condemned per se.

BMI implicitly signaled a shift away from *Topco*'s assertion that in cases of horizontal restraints, courts must "rigid[ly]" enforce the per se rule regardless of the competitive merits. But in *Maricopa*, a divided Court (4-3) reversed course. The Court struck down as unlawful per se an agreement among physicians to set a maximum fee for their services to subscribers to a health plan. The Court found that even if fee schedules provided "a uniquely desirable form of insurance coverage that could not otherwise exist," such price agreements between competitors were unlawful per se, because it was "not necessary that the doctors do the price fixing." 457 U.S. at 351-52. The Court cited *Topco* approvingly for the proposition that any change in the application of the per se rule must come from Congress. *Id.* at 354-55. And the Court distinguished *BMI* at length, observing (as noted in the *Guidelines*) that the *Maricopa* venture did not involve the integration of physician assets. *Id.* at 356.

The dissenters in *Maricopa* "would have expected [the Court] to acknowledge that *per se* characterization is inappropriate if the challenged agreement or plan achieves for the public procompetitive benefits that otherwise are not attainable. The Court does not do this." *Id.* at 364 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting). And the dissenters also found the "effort to distinguish *Broadcast Music* . . . unconvincing" because, in the dissenters' view, "each arrangement apparently makes possible a new product

by reaping otherwise unattainable efficiencies." *Id.* at 365. In light of *Maricopa*, it is not surprising that the Ninth Circuit viewed *BMI* as limited to the narrow situation (possibly unique to blanket licenses) where the new product is, in its essence, a jointly agreed-to price.

Since *Maricopa*, however, the Court has repeatedly held, in other contexts, that courts should resist using the per se rule to condemn conduct that may be procompetitive if evaluated under the rule of reason. See, *e.g.*, *California Dental*, 526 U.S. at 769-81 (vacating Ninth Circuit's "quick look" analysis for "a fuller consideration" under the rule of reason); *State Oil Co.* v. *Khan*, 522 U.S. 3, 22 (1997) (overruling *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), and holding that vertical maximum price-fixing is subject to rule of reason rather than unlawful per se); *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 724-25 (1988) (rule of reason, not per se rule, applies to vertical non-price restraints); *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 298 (1985) (unanimously reversing Ninth Circuit's decision that "applied *per se* analysis inappropriately" to an alleged group boycott).[11]

But since *Maricopa*, the Court has not revisited the role of per se analysis in evaluating the horizontal pricing agreements that routinely arise with legitimate joint ventures. Indeed, as Professor Louis observed over 20 years ago, even *BMI* alone did not provide the clarity needed, because *BMI* does not

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[11] In *National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85 (1984), the Court held that the rule of reason applied to a horizontal restraint among competitors, but not as a general principle of joint venture analysis. Rather, what was "critical is that this case involves an *industry* in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101 (emphasis added); *see* Pet. App. 22a (quoting this same limiting language). The Court then noted the "likelihood" that the per se rule would continue to apply "without inquiry into the special characteristics of a particular industry," and cited *Maricopa*. 468 U.S. at 100 n.21.

"distinguish *Topco* and does not hold that ancillary restraints should generally be analyzed under the rule of reason. Achievement of that seemingly inevitable result will require one more decision."[12] Yet in *Maricopa*, the Court turned away from the "inevitable result" to which *BMI* had rightly pointed.

This case is an appropriate vehicle for this Court to use in taking that step. The relevant facts here are straightforward and undisputed. The Ninth Circuit's application of the per se rule to condemn the same agreement that the district court and California Court of Appeal found to be lawful is egregiously wrong. The decision leaves petitioners and other businesses without meaningful guidance for lawful collaboration. For example, it is difficult to imagine how antitrust lawyers could now prudently advise a client to move forward with a legitimate joint venture that required the venturers to agree upon a price for some aspect of the necessary support or distribution of the new product without running a significant risk of serving up the client's "head on a silver platter."

The true "roadkill" of the Ninth Circuit opinion, therefore, will be the lost procompetitive benefits of abandoned joint ventures. As the Agencies have recognized, the Sherman Act should not deter beneficial collaboration. This Court should dispel the perception – reinforced with relish by the court of appeals – that participants in a legitimate joint venture remain vulnerable to per se attacks even for agreements on the price of services necessary to support their new products. The Court should reject the Ninth Circuit's per se ruling, resolve the circuit conflict and the tension within its prior cases, and hold that the pricing agreement challenged here did not violate Section 1.

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[12] M. B. Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do* Sealy *and* Topco *Logically Survive* Sylvania *and* Broadcast Music*?*, 66 Va. L. Rev. 879, 899 (1980).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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